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5                   UNITED STATES DISTRICT COURT  
6                   WESTERN DISTRICT OF WASHINGTON  
7                   AT TACOMA

8 DANIEL G.,

9                   Plaintiff,

10                  Case No. C18-5720JLR

11                  v.

12 COMMISSIONER OF SOCIAL  
13 SECURITY,

14                  ORDER REVERSING AND  
15                  REMANDING DENIAL OF  
16                  BENEFITS

17                  Defendant.

18                   **I. INTRODUCTION**

19 Plaintiff Daniel G. seeks review of the denial of his application for supplemental  
20 security income and disability insurance benefits. (*See* Compl. (Dkt. # 3).) Plaintiff  
21 contends that the Administrative Law Judge (“ALJ”) erred by (1) improperly rejecting  
22 Plaintiff’s symptom testimony, and (2) improperly evaluating the medical evidence. (Pl.  
23 Op. Br. (Dkt. # 19) at 1.) As discussed below, the court REVERSES the Commissioner’s  
final decision and REMANDS the matter for further administrative proceedings under  
sentence four of 42 U.S.C. § 405(g).

24                   **II. THE ALJ’S DECISION**

25 Utilizing the five-step disability evaluation process, 20 C.F.R. §§ 404.1520,

1 416.920, the ALJ found:

2       **Step one:** Plaintiff has not engaged in substantial gainful activity since November  
3           13, 2014, the alleged onset date. *See* 20 C.F.R. §§ 404.1571-76, 416.971-76.

4       **Step two:** Plaintiff has the following severe impairments: Degenerative disc  
5           disease with moderate lumbar changes, anxiety related disorders, and moderate  
6           level obesity. *See* 20 C.F.R. §§ 404.1520(c), 416.920(c).

7       **Step three:** Plaintiff does not have an impairment or combination of impairments  
8           that meets or medically equals the severity of one of the listed impairments in 20  
9           C.F.R. Part 404, Subpart P, Appendix 1. *See* 20 C.F.R. §§ 404.1520(d), 404.1525,  
10          404.1526, 416.920(d), 416.925, 416.926.

11      **Residual Functional Capacity (“RFC”):** Plaintiff can perform medium work as  
12           defined in 20 C.F.R. §§ 404.1567(c) and 416.967(c). He needs regular work hours  
13           and access to a bathroom at the work place for scheduled breaks. He cannot be  
14           subjected to unusual work stressors. He can engage in routine and perfunctory  
15           social interactions. He can take instructions from a supervisor and respond  
16           appropriately. He should not perform jobs that require higher level social  
17           interaction skills and/or being part of an intense collaborative project. He cannot  
18           do commercial driving.

19      **Step four:** Plaintiff cannot perform past relevant work. *See* 20 C.F.R.  
20          §§ 404.1565, 416.965.

21      **Step five:** Considering Plaintiff’s age, education, work experience, and RFC,  
22           there are jobs that existed in significant numbers in the national economy that  
23           Plaintiff can perform. *See* 20 C.F.R. §§ 404.1569, 404.1569(a), 416.969,  
24          416.969(a).

25      (Admin. Record (“AR”) (Dkt. # 9) at 24-40.) Based on these findings, the ALJ found  
26           that Plaintiff had not been under a disability, as defined by the Social Security Act  
27           (“Act”), from November 13, 2014, through the date of the ALJ’s decision. (*Id.* at 40.)  
28      The Appeals Council denied Plaintiff’s request for review, making the ALJ’s decision the  
29           Commissioner’s final decision. (*See id.* at 1-4.)

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### III. DISCUSSION

Plaintiff bears the burden of proving he is disabled within the meaning of the Act.

*See Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). Pursuant to 42 U.S.C. § 405(g), the court may only set aside a denial of social security benefits when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the court is required to examine the entire record, it may neither reweigh the evidence nor substitute its judgment for that of the ALJ. *See Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

#### A. The ALJ Did Not Harmfully Err in Discounting Plaintiff's Testimony

Plaintiff argues that the ALJ erred in rejecting his symptom testimony. (Pl. Op. Br. at 10-11.) Plaintiff focuses his argument on the ALJ's analysis of his testimony regarding his mental symptoms, so the court will do the same.

The Ninth Circuit has “established a two-step analysis for determining the extent to which a claimant’s symptom testimony must be credited.” *Trevizo v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017). The ALJ must first determine whether the claimant has presented objective medical evidence of an impairment that “‘could reasonably be expected to produce the pain or other symptoms alleged.’” *Id.* (quoting *Garrison v. Colvin*, 759 F.3d 995, 1014-15 (9th Cir. 2014)). At this stage, the claimant need only

1 show that the impairment could have caused some degree of his symptoms; he does not  
2 have to show that the impairment could reasonably be expected to cause the severity of  
3 the symptoms alleged. *Id.* The ALJ found that Plaintiff met this step. (AR at 29.)

4 If the claimant satisfies the first step, and there is no evidence of malingering, the  
5 ALJ may only reject the claimant's testimony ““by offering specific, clear and convincing  
6 reasons for doing so. This is not an easy requirement to meet.”” *Trevizo*, 871 F.3d at 678  
7 (quoting *Garrison*, 759 F.3d at 1014-15). In evaluating the ALJ’s determination at this  
8 step, the court may not substitute its judgment for that of the ALJ. *Fair v. Bowen*, 885  
9 F.2d 597, 604 (9th Cir. 1989). As long as the ALJ’s decision is supported by substantial  
10 evidence, it should stand, even if some of the ALJ’s reasons for discrediting a claimant’s  
11 testimony fail. See *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001).

12 The ALJ found evidence of malingering here. (AR at 34-35.) Affirmative  
13 evidence of malingering—standing alone—can support an ALJ’s rejection of the  
14 plaintiff’s testimony. See *Brown v. Astrue*, 405 F. App’x 230, 232 (9th Cir. 2010) (citing  
15 *Smolen v. Chater*, 80 F.3d 1273, 1283-84 (9th Cir. 1996)); *Schow v. Astrue*, 272 F. App’x  
16 647, 651 (9th Cir. 2008) (The existence of “affirmative evidence suggesting malingering  
17 vitiates the clear and convincing standard of review”) (internal quotation marks omitted).  
18 The ALJ noted that an emergency room doctor opined that Plaintiff was malingering to  
19 avoid incarceration after a DUI arrest. (AR at 34.) The doctor noted that Plaintiff put  
20 blood in his urine to support a false claim of kidney stones. (*Id.* at 34, 665.) Plaintiff  
21 further admitted that he lied to examining doctor Keith Krueger, Ph.D., about his  
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1 symptoms and actions during a psychological evaluation. (*Id.* at 34-35, 82, 90-93.) The  
2 ALJ reasonably interpreted this evidence in determining that Plaintiff exaggerated his  
3 symptoms, and did not err in discounting Plaintiff's testimony as a result.

4 In addition to evidence of malingering, the ALJ found that Plaintiff's testimony  
5 concerning the intensity, persistence, and limiting effects of his mental impairments was  
6 "not entirely consistent with the medical evidence and other evidence in the record." (*Id.*  
7 at 29.) The ALJ gave three reasons for this determination. First, the ALJ reasoned that  
8 Plaintiff's allegations were inconsistent with his treatment record, which showed that his  
9 symptoms were well-controlled by medication. (*Id.* at 31-34.) Second, the ALJ reasoned  
10 that Plaintiff's work-type activities were inconsistent with the severity of the symptoms  
11 he alleged. (*Id.* at 34.) Third, the ALJ reasoned that Plaintiff's testimony was  
12 inconsistent with the statements he made to his treatment providers. (*Id.* at 34-35.)

14 The ALJ's first two reasons fall short of clear and convincing. The overall  
15 treatment record does not clearly establish that Plaintiff's symptoms were well-controlled  
16 by medication, especially to the point where he could function in a work environment.  
17 Cf. *Garrison*, 759 F.3d at 1017 n.23 ("There can be a great distance between a patient  
18 who responds to treatment and one who is able to enter the workforce . . .") (quoting  
19 *Scott v. Astrue*, 647 F.3d 734, 739-40 (7th Cir. 2011)).

20 Similarly, Plaintiff's activities did not demonstrate that he could sustain work.  
21 The ALJ reasoned that Plaintiff's "mental health diagnosis appear[ed] to stem primarily  
22 from childhood issues, [but] he was able to work at substantial gainful activity in the  
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1 past.” (AR at 34.) The record does not reveal when Plaintiff’s impairments manifested,  
2 so the fact that his mental issues stemmed from childhood trauma does not convincingly  
3 justify rejecting his testimony.

4       The ALJ’s third reason, however, withstands scrutiny. An ALJ may reject a  
5 claimant’s symptom testimony when the claimant makes inconsistent statements  
6 concerning his symptoms. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir.  
7 2008). The ALJ’s reasoning overlaps with his finding that Plaintiff was malingering.  
8 (See AR at 34-35.) Plaintiff admitted lying to an examining psychologist about his  
9 mental symptoms. The ALJ was not obligated to believe that Plaintiff was telling the  
10 truth at the hearing given this fact, and thus did not err in rejecting Plaintiff’s testimony  
11 on this basis.

12       Plaintiff has failed to show that the ALJ committed harmful error in rejecting  
13 Plaintiff’s symptom testimony. *See Ludwig v. Astrue*, 681 F.3d 1047, 1054 (9th Cir.  
14 2012) (citing *Shinseki v. Sanders*, 556 U.S. 396, 407-09 (2009)). Although the ALJ’s  
15 analysis was not free from error, those errors do not undermine the validity of the ALJ’s  
16 reasoning with respect to Plaintiff’s malingering and inconsistent statements. The ALJ’s  
17 errors were thus inconsequential to the outcome, and therefore harmless. *See Molina v.*  
18 *Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012).

19       **B. The ALJ Partially Erred in Evaluating the Medical Evidence**

20       Plaintiff argues that the ALJ erred in evaluating the medical evidence. (Pl. Op. Br.  
21 at 4-10.) In particular, Plaintiff argues that the ALJ erred in rejecting the medical  
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1 opinions of examining doctor Kimberly Wheeler, Ph.D., consulting doctor Faulder  
2 Colby, Ph.D., and treating doctor Minerva Arrienda, M.D. (*Id.*)

3       1.     The ALJ Did Not Harmfully Err in Rejecting Dr. Wheeler's Opinions

4              Dr. Wheeler examined Plaintiff on October 18, 2016. (AR at 643-47.) Plaintiff  
5 reported to Dr. Wheeler that he had assaulted coworkers, fought gang members in prison,  
6 killed animals including pets, and killed a man in prison. (*Id.* at 643-44.) Dr. Wheeler  
7 noted that Plaintiff "became intensely angry" during the clinical interview, stating that he  
8 felt he was being interrogated. (*Id.* at 643.)

9              Dr. Wheeler opined that Plaintiff was markedly limited in his ability to  
10 understand, remember, and carry out detailed instructions; perform activities within a  
11 regular schedule and maintain attendance; and maintain appropriate behavior in a work  
12 setting. (*Id.* at 645.) Dr. Wheeler opined that Plaintiff was severely limited in his ability  
13 to adapt to routine changes in a work setting; communicate and perform effectively in a  
14 work setting; and complete a normal work day or week without interruptions from his  
15 psychologically-based symptoms. (*Id.*) Dr. Wheeler opined that Plaintiff was a  
16 "[s]everely disturbed gentleman" who "[c]omes across with a coiled intensity, that  
17 conveys a sense of being ready to fly into rage, aggressiveness, or abject panic." (*Id.* at  
18 646.)

19              The ALJ gave Dr. Wheeler's opinions little weight. *Id.* at 36. The ALJ reasoned  
20 that Dr. Wheeler did not have an accurate picture of Plaintiff's overall health because she  
21 did not review his treatment record, Plaintiff gave different reports to Dr. Wheeler than  
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1 he did to his treatment providers, and Plaintiff's presentation on the day of Dr. Wheeler's  
2 examination differed from his presentation to his regular treatment providers. *Id.*

3 An ALJ must provide "specific and legitimate reasons that are supported by  
4 substantial evidence in the record" to reject the opinion of an examining doctor when it is  
5 contradicted. *See Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996) (citing *Andrews*,  
6 53 F.3d at 1042). The ALJ's reasons here boil down to a determination that Dr.  
7 Wheeler's observations were inconsistent with the overall medical record. That is a valid  
8 reason to reject an examining doctor's opinions as long as the determination is supported  
9 by substantial evidence in the record. *See Batson v. Comm'r of Soc. Sec. Admin.*, 359  
10 F.3d 1190, 1195 (9th Cir. 2004).

12 The ALJ's primary concern was that Plaintiff reported assaultive behavior and  
13 animal cruelty that Plaintiff had not reported to his treating providers. (*See* AR at 36.)  
14 But Plaintiff reported to his treatment providers on multiple occasions that he had killed  
15 cats and other animals. (*See, e.g., id.* at 411, 467, 470, 524, 898.) The ALJ's  
16 determination on this issue was thus not supported by substantial evidence in the record.

17 The ALJ's next concern was that Plaintiff presented differently to Dr. Wheeler  
18 than he had to his treatment providers. (*Id.* at 36.) Dr. Wheeler reported that Plaintiff  
19 was rocking in his chair and breathing heavily during the examination. (*Id.* at 36, 644.)  
20 He told Dr. Wheeler he always knew how many steps it would take to reach others in  
21 case he wanted to assault them. (*Id.* at 33, 644.) By contrast, the next day, Plaintiff  
22 presented to one of his treatment providers with a neutral mood, logical thought process,  
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1 appropriate judgment, and appropriate insight into his condition. (*Id.* at 36, 908.) The  
2 ALJ's conclusion here was a reasonable interpretation of the evidence, particularly in  
3 light of Plaintiff's admission that he had misrepresented his symptoms to another  
4 examining psychologist. (*Id.* at 36.)

5 Once again, although the ALJ's analysis was not without error, Plaintiff has failed  
6 to show harmful error. *See Ludwig*, 681 F.3d at 1054 (citing *Shinseki*, 556 U.S. at  
7 407-09). The ALJ's error in finding that Plaintiff had not reported animal cruelty to other  
8 providers does not invalidate the ALJ's determination that Plaintiff presented differently  
9 to Dr. Wheeler than he did to his treatment providers. The error was thus inconsequential  
10 to the outcome, and therefore harmless. *See Molina*, 674 F.3d at 1115.

12       2.     The ALJ Did Not Harmfully Err in Rejecting Dr. Colby's Opinions

13       Dr. Colby did not examine Plaintiff, but reviewed Dr. Krueger and Dr. Wheeler's  
14 reports. (*See AR* at 648-52.) Dr. Colby opined that Plaintiff's limitations were the same  
15 as those to which Dr. Wheeler had opined. (*See id.* at 649.)

16       The ALJ gave Dr. Colby's opinions little weight. (*Id.* at 36.) The ALJ rejected  
17 Dr. Colby's opinions "for the same reasons that Dr. Wheeler's evaluation is given little  
18 weight." (*Id.*)

19       The standard for rejecting the opinions of a non-examining doctor, although not  
20 well-defined, is lower than the standard necessary to reject the opinions of a treating or  
21 examining doctor: In general, an ALJ "may reject the opinion of a non-examining  
22 physician by reference to specific evidence in the medical record." *Sousa v. Callahan*,  
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1 143 F.3d 1240, 1244 (9th Cir. 1998) (citations omitted). Because the ALJ met the higher  
2 standard applicable to Dr. Wheeler, and the ALJ relied on the same reasons for rejecting  
3 Dr. Colby's opinions, the ALJ did not err in rejecting Dr. Colby's opinions. *See supra*  
4 Part III.B.1.

5       3.     The ALJ Harmfully Erred in Rejecting Dr. Arrienda's Opinions

6 Plaintiff's mental health counselor, Kathleen Bieker, submitted a medical source  
7 statement that was cosigned by Dr. Arrienda. (AR at 586-89.) The ALJ evaluated the  
8 opinions in that statement as those of Dr. Arrienda, so the court will do the same. (*See id.*  
9 at 37.) In that statement, Dr. Arrienda opined that Plaintiff had significant limitations in  
10 his abilities related to understanding and memory, sustained concentration and  
11 persistence, social interaction, and adaptation. (*Id.* at 586.)

13       The ALJ gave Dr. Arrienda's statement little weight. (*Id.* at 37.) The ALJ  
14 reasoned that Dr. Arrienda's opinions were inconsistent with her own treatment notes,  
15 and inconsistent with Plaintiff's activities during the alleged disability period. (*Id.*)

16       The ALJ's first reason for rejecting Dr. Arrienda's opinions—that they were  
17 inconsistent with her treatment notes—does not withstand scrutiny. The ALJ reasoned  
18 that Dr. Arrienda's opinions were inconsistent with the fact that her treatment records  
19 showed Plaintiff's medications worked well for him and his condition was stable. (*Id.* at  
20 37.) But, as with his analysis of Plaintiff's testimony, the ALJ failed to acknowledge that  
21 improvement and stability do not necessarily equate to the ability to work. *See supra* Part  
22 III.A. Dr. Arrienda, as the treatment provider, was in the best position to evaluate the  
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1 extent to which Plaintiff's medications were working, and the ALJ did not adequately  
2 explain why Dr. Arrienda's interpretation of her own clinical findings was flawed. *See*  
3 *McAllister v. Sullivan*, 88 F.2d 599, 602 (9th Cir. 1989).

4       The ALJ's second reason for rejecting Dr. Arrienda's opinions—that they were  
5 inconsistent with Plaintiff's activities during the alleged disability period—also fails.  
6 The ALJ gave only a vague statement that Plaintiff's "activities that included doing work  
7 during his alleged period of disability" were inconsistent with Dr. Arrienda's opinions.  
8 (AR at 37.) The ALJ failed to identify what inconsistencies he was referring to, and the  
9 record does not reveal any obvious examples. The ALJ's analysis was thus too vague to  
10 support rejecting Dr. Arrienda's opinions.

12       Because the ALJ failed to provide a specific and legitimate reason for rejecting Dr.  
13 Arrienda's opinions, he harmfully erred. The court cannot confidently conclude that the  
14 ALJ would have reached the same nondisability determination had he properly analyzed  
15 Dr. Arrienda's opinions, so the ALJ's errors must be deemed harmful. *See Molina*, 674  
16 F.3d at 1116 (holding that "a reviewing court cannot consider [an] error harmless unless  
17 it can confidently conclude that no reasonably ALJ, when fully crediting the [discounted  
18 evidence], could have reached a different disability determination").

19       **C. The ALJ Erred in Evaluating Plaintiff's RFC**

20       Plaintiff argues that the ALJ erred in his RFC determination and hypothetical  
21 questions to the vocational expert because he failed to properly evaluate the evidence  
22 discussed above. (Pl. Op. Br. at 11-12.) Because the court has found that the ALJ erred  
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1 in evaluating Dr. Arrienda's opinions, the court agrees. An ALJ's RFC that does not  
2 properly account for all of the evidence is not supported by substantial evidence. *See*  
3 *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 885 (9th Cir. 2006).

4 **D. Scope of Remand**

5 Plaintiff asks the court to remand for an award of benefits. (Pl. Op. Br. at 2.) The  
6 court may remand for an award of benefits where "the record has been fully developed  
7 and further administrative proceedings would serve no useful purpose." *McCartey v.*  
8 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen*, 80 F.3d at 1290). But  
9 remand for an award of benefits "is a rare and prophylactic exception to the  
10 well-established ordinary remand rule." *Leon v. Berryhill*, 880 F.3d 1041, 1044 (9th Cir.  
11 2017). If additional proceedings can remedy defects in the original administrative  
12 proceedings, a social security case should be remanded for further proceedings.  
13 *McCartey*, 298 F.3d at 1076. Even when all elements of the remand-for-benefits  
14 exception are met, the court maintains discretion to remand for further proceedings. *See*  
15 *Leon*, 880 F.3d at 1045 (citing *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090,  
16 1101 (9th Cir. 2014)).

18 The appropriate remedy here is to remand for further proceedings. Among other  
19 things, Plaintiff's admitted dishonesty to medical providers creates substantial ambiguity  
20 as to how to evaluate all of the medical evidence. The ALJ, not the court, must decide  
21 how to account for that fact and weigh the evidence. *See Andrews*, 53 F.3d at 1039.  
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23 On remand, the ALJ must reevaluate Dr. Arrienda's opinions and conduct further

1 proceedings as necessary to reevaluate the disability determination in light of this  
2 opinion.

## IV. CONCLUSION

For the foregoing reasons, the Commissioner's final decision is REVERSED and this case is REMANDED for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

DATED this 18th day of June, 2019.

John P. Blunt

JAMES L. ROBART  
United States District Judge